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IN THE

Supreme Court of the United States

October Term, 1966

NO. 493

JOSEPH ROBERT RALPH, EUGENE C. LEWIS, and M. RAY HURST, JR., et al,

Petitioners,

versus

TIDEWATER CONSTRUCTION CORPORATION, a corporation, RAYMOND INTERNATIONAL, INC., a corporation, and PETER-KIEWIT SONS' CO., a corporation, Joint venturers, trading as TIDEWATER-RAYMOND-KIEWIT, and MERRITT-CHAPMAN & SCOTT CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

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INDEX

	Page
OPINIONS BELOW	2
JURISDICTION	3
QUESTIONS PRESENTED	3
STATUTES INVOLVED	3
STATEMENT	4
REASONS FOR GRANTING WRIT	6
CONCLUSION	10
APPENDIX A — STATUTES	11
APPENDIX B—ADMINISTRATIVE RULINGS AND OPINIONS BELOW	14

CITATIONS

CASES:

Handler v. Thrasher, (10 Cir. 1951) 191 F. 2d 120, 123	8
Steiner v. Mitchell, (1956) 350 U.S. 247, 253	6, 8
Wirtz v. Leonard, (5 Cir. 1963) 317 F. 2d 768	8

STATUTES:

Fair Labor Standards Act, 29 U.S.C. 206, (a), (1)	3, 11
Fair Labor Standards Act, 29 U.S.C. 207, (a), (1)	3, 11
Portal to Portal Act, 29 U.S.C. 254	4, 6, 11
Portal to Portal Act, 29 U.S.C. 258	6, 13

MISCELLANEOUS:

29 C.F.R. 790.9 (b)	7

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Petitioners, Joseph Robert Ralph, Eugene C. Lewis

and M. Ray Hurst, Jr., et al [1] pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit in the above entitled cause of May 30, 1966. [2]

OPINIONS BELOW

The initial administrative ruling in this case was made by Regional Director Pat Meloan of the United States Department of Labor, Wage and Hour and Public Contracts Division, (R. Vol. II, p. 135) and is printed in Appendix B hereto, infra, p. 14.

The final administrative ruling of Administrator Clarence T. Lundquist of the United States Department of

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[1] This petition involves three cases pertaining to the identical points of law. They were consolidated for the purpose of trial in the District Court and heard as a single case on a single record in the Court of Appeals for the Fourth Circuit. The numbers of the cases below, consolidated for argument, with the actual plaintiffs involved are:

No. 10,269 — Joseph Robert Ralph, F. A. Board, Joseph G. Burns, Alvin E. Campbell, James W. Carrington, Clayton C. Cope, Carlton P. Corbett, Robert W. Cox, Paul A. Delaney, William M. Delesline, Willard S. Dudley, Jr., Henry N. Early, Charles G. Elswick, Victor W. Fletcher, Robert W. Fowler, Richard K. Freeman, John W. Goley, Jasper, S. Goodwin, Odis R. Goodwin, B. F. Jones, Ralph M. Lewis, Henry F. McKeithan, Marvin Milton Morgan, Donald H. Murden, Louis H. Myers, A. A. Nance, Jr., James M. Perkins, Jr., Harry W. Pouchie, Sam L. Price, Earl G. Read, Johnnie N. Roberson, Leonard R. Roberson, Thomas G. Roberson, J. W. Robinson, W. R. Short, Robert E. Thomas, Felix R. Thornton, Rudolph Ward, Frank T. White, Jr., James J. White and James Mayo Wynn.

No. 10,270 — Eugene C. Lewis, Ray Ball, Jr., Oscar Bergman, George H. Cooney, Marvin S. Bonney, John P. Braswell, Wilbur Brinson, Harold B. Cartwright, Roy Goodson, George Gray, R. C. Gray, Jr., George N. Hanbury, Thomas F. Jordan, Ralph M. Keating, Joseph C. Kelly, Robert J. Mapp, James W. Patterson, Edwin M. Porter, Rufus J. Powell, D. W. Reebals, Charles A. Sarkis, D. S. Shannon, Lennon F. Smith, Wesley Tart, Curtis I. Tebault and Denward J. Womack.

No. 10,271 — M. Ray Hurst, Jr., and T. O'Neal, Jr.

[2] As a test, a petition for rehearing aws sought in case No. 10,269, Joseph Robert Ralph, et al, vs. Tidewater-Raymond-Kiewit, et al, which petition was denied on July 20, 1966.

Labor, Wage and Hour and Public Contracts Division, (R. Vol. II, 139 (is printed in Appendix B hereto, infra, p. 18).

The oral opinion of the District Court (R. Vol. I, 93) is unreported and is printed in Appendix B hereto, infra, p. 21.

The opinion of the Circuit Court of Appeals for the Fourth Circuit is reported at 361 F. (2d) 806, and is printed in Appendix B hereto, infra, p. 23.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

QUESTIONS PRESENTED

(1) Whether the "written contract" exception to the Portal to Portal Act allows a Fair Labor Standards Act interstate employer to enter into a collective bargaining argreement with a union for payment of less than the Fair Labor Standards Act minimums.

(2) Whether union workers who are required by their employer to (1) report at assembly sites, proceed to loading piers, (2) board company owned boats and (3) ride to the worksite in the middle of Chesapeake Bay under the supervision of the company are to be considered as travelling to work under the Portal to Portal Act.

STATUTES INVOLVED

The statutory provisions involved are the Fair Labor Standards Act, 29 U.S.C. 206, (a), (1), printed in Appendix A hereto, infra, p. 11 and 207, (a), (1), printed in Appendix A hereto, infra, p. 11, and the Portal to Portal

Act, 29 U.S.C. 254, printed in Appendix A hereto, infra, p. 11.

STATEMENT

The employers who are the respondents in this Petition, are Tidewater Construction Corporation, Raymond International, Inc., and Peter Kiewit Sons' Company, who formed a joint venture trading as Tidewater-Raymond-Kiewit, and who together with Merritt-Chapman & Scott Corporation undertook to construct a 17.9 mile ocean highway consisting of a series of bridges and tunnels spanning Chesapeake Bay where it meets the Atlantic Ocean. [3] The respondents will hereinafter be designated as "EMPLOYERS".

Petitioners are iron workers and operating engineers employed to man specially designed equipment for the construction of the project and will be hereinafter designated as "WORKERS".

The conditions of employment required "WORKERS" to assemble at the yard base of "EMPLOYERS" at times designated by "EMPLOYERS", there to don life preservers and hard hats and board boats owned and operated by "EMPLOYERS" so as to rendezvous as assembled crews at various work sites in Chesapeake Bay. (R. Vol. I, p. 20) The time consumed in getting to the various sites in the Bay as the work progressed varied from thirty minutes to one hour each way. (R. Vol. I, p. 55) "WORKERS" were covered by workmens' compensation and were under the orders of "EMPLOYERS" and performed such work as might be required commencing with reporting time ashore. (R. Vol. I, p. 58)

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[3] Tidewater-Raymond-Kiewit constructed the bridges and Merritt-Chapman & Scott constructed the tunnels that constitute this ocean highway.

"EMPLOYERS" reached the decision not to compensate workers on a regular time basis for the time consumed in riding the boats from shore to construction sites in the Bay. This decision precipitated negotiations between "EMPLOYERS" and unions representing "WORKERS", as "WORKERS" desired full compensation under the Fair Labor Standards Act, hereinafter designated as "F.L.S.A.", starting with the hour they were required to report at the assembly sites ashore. "WORKERS" had insufficient economic strength to obtain a contract so providing, (R. Vol. I, p. 54) and as a compromise a written agreement was entered into between the parties for "WORKERS" to be paid a flat sum of $2.50 per day for the time involved, without regard to the actual hours involved. No representatives of "EMPLOYERS" sought administrative approval prior to the inception of the scheme of payment decided upon. (R. Vol. I, pp. 63, 64) After the commencement of construction an investigation was conducted by Regional Director Pat Meloan of the Wage and Hour and Public Contracts Division of the Department of Labor and "EMPLOYERS" were notified that the provision in the contract between the parties to compensate for the activity of assembling and riding the boats precluded the immunity of the Portal to Portal Act and made the time compensable under "F.L.S.A.".

"EMPLOYERS'" representatives arranged an ex parte conference with the Administrator of the Wage and Hour and Public Contracts Division of the Department of Labor in Washington, D. C., and on the basis of the facts presented by "EMPLOYERS", the Administrator ruled the question close, but reversed the Regional Director.

Suit was brought by "WORKERS" under "F.L.S.A." in the District Court and although a jury was impaneled both parties moved for a judgment on the evidence. The Lower Court ruled as a matter of law that the Regional

Director was correct that an agreement in writing to compensate for the subject activity excluded the matter from the Portal to Portal Act and required compliance with "F.L.S.A.". The Court ruled as a matter of law that the activity was preliminary and postliminary activity that in the absence of a written agreement would be protected by the Portal to Portal Act.

The Lower Court permitted the jury to pass upon "EMPLOYERS' " defense of good faith reliance on an administrative ruling, 29 U.S.C. 258, which section is printed in Appendix A hereto, infra, p. 13. The jury found for "EMPLOYERS" on this defense and "WORKERS" appealed to the Court of Appeals for the Fourth Circuit.

The Appellate Court reversed the District Court, holding that the good faith reliance defense was not available to "EMPLOYERS", and the Court reversed the District Court holding that the Portal to Portal Act, 29 U.S.C. 254, permitted parties to agree in writing to compensate for travel time at a rate less than required by "F.L.S.A.", but affirmed the District Court's ruling that as a matter of law the time spent in boats was Portal to Portal activity.

REASONS FOR GRANTING WRIT

1. The purpose of the Portal to Portal Act was to eliminate the unexpected exposure of industry for substantial claims to overtime by reason of activities that had never been compensable in any amount. *Steiner* v. *Mitchell,* (1956) 350 U.S. 247, 253.

Congress made it clear that immunization would be awarded an "EMPLOYER" ony with respect to unexpected liability by specifically precluding the protection of the Act from any activity compensable by either an ex-

press provision of a written or non-written contract between an employee, his agent or collective bargaining representative and his employer.

This significant exclusion of nationwide applicability to labor-management contracts has never been interpreted by this Court or an appellate court, prior to the instant decision. The history of administrative and judicial rulings in this case memorializes the uncertainty and confusion that currently prevails regarding what appears to be the clear language of the Portal to Portal Act.

Despite the apparent clear intent of the statement of policy of the Department of Labor published in 29 C.F.R. 790.9 (b), [4] the Regional Director differs with the Administrator [5] and the District Court differs with the Circuit Judges. [6]

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[4] 29 C.F.R. 790.9 (b):

"The word 'compensable' is used in subsections (b), (c) and (d) of Section 4 without qualification. It is apparent from these provisions that 'compensable' as used in the statute, means compensable in any amount."

[5] (R. Vol. II, p. 138):

"* * * Unquestionably the riding activities of employees represented by Local 147 have been made compensable by contract. * * * the parties cannot by contract nullify requirements of the statute by attempting to agree that the time 'will not be considered as working time for any purpose.' "

(R. Vol. II, p. 142)

"* * * Although concededly this is a borderline case in which a strong argument may be made that the language of the contract provisions makes the travel activity itself compensable, we believe the conclusion we have reached is more consistent with the meaning which the parties attribute to the contract language."

[6] (R. Vol. I, p. 93):

"The Act expresses a basic proposition and it appears to the Court that the language of the Act is very plain and should be applied literally. * * * Once parties to a labor contract make a bargain for the compensation of travel, they should know that it will be considered in computing wages. The Act clearly provides for his. If the Act is construed otherwise, the language of every contract would have to be scrutinized, and labor agreements could provoke litigation. There are

The holding of the Appellate Court that the parties could agree in writing to compensate for the activity of assembling and riding on terms less than required by "F.L.S.A." constitutes an indirect attack on the established principle that no written contract can have the effect of diluting the overtime policies of "F.L.S.A." regardless of the intent of the parties. *Wirtz* v. *Leonard,* (5 Cir. 1963) 317 F. 2d 768 and *Handler* v. *Thrasher,* (10 Cir. 1951) 191 F. 2d 120, 123. [7]

An essential prerequisite to harmony between labor and management is an understanding of the legislative ground rules governing compensation and negotiations. Judicial confusion should be eliminated by the ruling of this Court. It is important that national acts, such as the "F.L.S.A." and the Portal to Portal Act receive uniform interpretation by the Federal Courts and such uniformity with respect to important provisions of these Acts can be aided by a review of the instant decision by this Court.

2. This Court in *Steiner v. Mitchell,* (1956) 350 U.S. 247, declared that the purpose of the Portal to Portal Act was to protect employers from wholly unexpected liabilities arising from overtime suits based upon activities that employers could not reasonably expect to be covered by "F.L.S.A.". Having declared this purpose, the Court re-

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many statutes that are designed to put litigation at rest and this, it appears to the Court, is one of them."

(R. Vol. III, p. 36):

"• • • Looking a the agreements the only reasonable construction was that the activity did not comprise compensable work hours. See *Gramiak* v. *Pittston Stevedoring Corp.,* 13 WH Cas. 17, 30 CCH Par. 70,098 (S.D.N.Y. 1956) • • •"

[7] In *Handler* v. *Thrasher,* (10 Cir. 1951) 191 F. 2d 120, 123, Circuit Judge Murrah, stated:

"• • • But it is too well settled to admit of discussion that a contract which has for its purpose or which has the effect of circumventing or invading the command of the Wage and Hour Act, is invalid and unenforceable."

fused to condone a liberal interpretation of the immunization granted the employer with respect to preliminary and postliminary activities and held that activities which were an integral and indispensable part of the principal activities for which covered workmen were employed would not be covered by the Portal to Portal Act.

The push of progress is sending specially trained work crews to offshore construction sites to build ocean highways, Texas towers, permanent navigational aids and similar structures. The requirements of offshore construction activities apparently were not contemplated by the authors of the Portal to Portal Act and are in need of judicial interpretation.

The requirement of industry to assemble these trained crews at a designated place at times certain and there to travel the open seas under the direction and control of the employer is an integral and indispensable part of offshore construction activities. Here, admittedly, "WORKERS" were composed of crews trained to operate special construction equipment designed to construct an ocean highway. The uniqueness of the equipment created industrial baptisms for identifying this equipment such as "THE TWO HEADED MONSTER" and the "BIG D". "WORKERS" were required to report to "EMPLOYERS' " assembly sites at "EMPLOYER" appointed times, there to board "EMPLOYERS' " boats so the crews would arrive as a team at various sites in Chesapeake Bay. The importance to "EMPLOYERS" of keeping the crews together caused "EMPLOYERS" to pay two hours regular wages as a consideration of "WORKERS" being at the assembly sites pursuant to "EMPLOYERS' " orders on days when the weather was too rough for the boats to go to sea. (R. Vol. I, p. 58)

No other Circuit appears to have dealt with this par-

ticular type activity and the need for clarifying the applicability of the Portal to Portal Act to the relatively unique working conditions in this new field of endeavor by the building trades of this nation suggests review of the instant opinion by this Court.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

HENRY E. HOWELL, JR.
Counsel for Petitioners.

August 26, 1966

APPENDIX A

Statutory Provisions Cited And Quoted

Fair Labor Standards Act,
29 U.S.C. 206, (a), (1):

§ 206. Minimum wage

(a) Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce wages at the following rates—

(1) not less than $1.15 an hour during the first two years from the effective date of the Fair Labor Standards Amendments of 1961, and not less than $1.25 an hour thereafter, except as otherwise provided in this section;

Fair Labor Standards Act,
29 U.S.C. 207, (a), (1):

§ 207. Maximum hours

(a) (1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and a half times the regular rate at which he is employed; and

Portal to Portal Act,
29 U.S.C. 254:

§ 254. Relief from certain future claims under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, and the Bacon-Davis Act

(a) Except as provided in subsection (b) of this section, no employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any of the following activities of such employee engaged in on or after May 14, 1947 —

(1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and

(2) activities which are preliminary to or postliminary to said principal activity or actvities,

which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

(b) Notwithstanding the provisions of subsection (a) of this section which relieve an employer from liability and punishment with respect to an activity, the employer shall not be so relieved if such activity is compensable by either —

(1) an express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or

(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee is employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.

(c) For the purposes of subsection (b) of this section, an activity shall be considered as compensable under such contract provision or such custom or practice only when it is engaged in during the portion of the day with respect to which it is so made compensable.

(d) In the application of the minimum wage and overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended, of the Walsh-Healey Act, or of the Bacon-Davis Act, in determining the time for which an employer employs an employee with respect to walking, riding, traveling, or other preliminary or postliminary activities described in subsection (a) of this section, there shall be counted all that time, but only that time, during which the employee engages in any such activity which is compensable within the meaning of subsections (b) and (c) of this section. May 14, 1947, c. 52, § 4, 61 Stat. 86.

Portal To Portal Act,
29 U.S.C. 258:

§ 258. Reliance on past administrative rulings, etc.

In any action or proceeding commenced prior to or on or after May 14, 1947 based on any act or omission prior to May 14, 1947, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any administrative regulation, order, ruling, approval, or interpretation, of any agency of the United States, or any administrative practice or enforcement policy of any such agency with respect to the class of employers to which he belonged. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or

omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect. May 14, 1947, c. 52, § 9, 61 Stat. 88.

APPENDIX B

Copies of Administrative Rulings and Opinions Below

Administrative Ruling of Regional Director, United States Department of Labor, Wage and Hour and Public Contracts Division:

U. S. DEPARTMENT OF LABOR
WAGE AND HOUR AND PUBLIC CONTRACTS DIVISIONS
U. S. Courthouse, 801 Broad
Nashville 3, Tennessee

September 26, 1961

Merritt-Chapman and Scott Corporation
Post Office Box 9508
Norfolk 5, Virginia

Re: Status of Travel Time—Chesapeake Bay Bridge-Tunnel Project

Gentlemen:

You have inquired whether time spent by your employees in riding by boat to and from the work sites of the above project is compensable work time under the Fair Labor Standards Act. According to the information we were furnished, this project involves construction of a series of bridges and tunnels from the vicinity of Little Creek, Virginia, to the vicinity of Kiptopeke, Virgina, designed to replace the present ferry system. The employees in question are required to work on equipment stationed offshore in Chesapeake Bay. Before their work shift begins, these employees report at a designated time and place on

shore, embark in boats provided by you and are transported to various assigned points in the Bay where construction is being performed. After the work shift ends, the employees are transported by boat from the work sites to shore where they obtain other transportation to their homes.

We are advised that there is in effect between your company and the Union which represents part of the employees in question an agreement containing the following provisions:

"It is hereby agreed between Tidewater-Merritt-Raymond-Kiewit (Tidewater Construction Corporation, Merritt-Chapman & Scott Corporation, Raymond International, Inc., and Peter Kiewit Sons' Company) and the International Union of Operating Engineers, Local Union No. 147, in regard to persons represented by the Union employed on the Chesapeake Bay Bridge-Tunnel Project that on each day that an employee rides on a boat getting to and from his place of employment, he shall receive a travel allowance of $2.50 per day.

"This allowance shall fully compensate the employee for any time spent in riding to and from work and fully satisfies the provision of Article VIII of the basic agreement between the Contractors in the area and the Union."

We are advised also that a Memorandum of Understanding has been signed by the contractors and the local union representing your pile driver and dock builder employees which provides as follows:

"'It is hereby agreed by Tidewater-Merritt-Raymond-Kiewit (Tidewater Construction Corporation, Merritt-Chapman & Scott Corporation, Raymond International, Inc., and Peter Kiewit Sons' Company), in regard to pile drivers and dock builders employed on the Chesapeake Bay Bridge-Tunnel Project, that on each day that such an

employee rides on a boat getting to and from his place of employment, he shall receive $2.00 per day in addition to the wages agreed upon in the existing local agreement.

"Pile Drivers and Dock Builders Local Union No. 567 agrees on behalf of those it represents that pile drivers and dock builders will accept the amount stipulated in the first paragraph as a payment for the inconvenience involved in getting to and from work, and further agrees that any time spent by such employees riding in boats to and from work will not be considered as working time for any purpose. The Union also agrees that no effort will be made to negotiate regarding this subject, for the duration of the project."

Section 4 of the Portal-to-Portal Act of 1947 contains certain provisions relating to compensability under the Fair Labor Standards Act of time spent by employees in riding to and from the place of performance of the principal activities for which they are employed. These provisions are discussed in detail in the enclosed Interpretative Bulletin, Part 790, Sections 790.3 to 790.12. You will note particularly in Section 790.4(b) of the enclosed bulletin the following language:

"Under section 4 of the Portal Act, an employer who fails to pay an employee minimum wages or overtime compensation for or on account of activities engaged in by such employee is relieved from liability or punishment therefor if, and only if, such activities meet the following three tests:

"(1) They constitute 'walking, riding, or traveling' of the kind described in the statute, or other activities 'preliminary' or 'postliminary' to the 'principal activity or activities' which the employee is employed to perform; and

"(2) They take place before or after the performance of all the employee's 'principal activities' in the workday; and

"(3) They are not compensable, during the portion of

the day when they are engaged in, by virtue of any contract, custom, or practice of the kind described in the statute."

On the basis of the facts outlined above it would appear that only two of the three prescribed tests are not as regards the riding time of employees concerning which you made inquiry. Unquestionably the riding activities of employees represented by Local 147 have been made compensable by contract. It seems equally clear, despite certain language used in the Memorandum of Understanding between the contractors and Local No. 567, that the activities of pile drivers and dock builders, while riding in boats to and from work in the Bay, were not made "not compensable . . . by virtue of any contract, custom or practice of the kind described in the statute." On the contrary, the Memorandum of Understanding recites that these employees are to be paid $2.00 extra per day "as a payment for the inconvenience involved in getting to and from work." This appears to fall within the terms of Section 4(b) of the Portal Act as an activity which is compensable by "an express provision of a written . . . contract." Since the time spent in such an activity was held by the Supreme Court of the United States to be compensable work time under Sections 6 and 7 of the Fair Labor Standards Act (*Tenn. Coal, Iron & RR Co.* v. *Musceda Local,* 321 U.S. 590; *Anderson* v. *Mt. Clemens Pottery Co.,* 328 U.S. 680), the parties cannot by contract nullify requirements of the statute by attempting to agree that the time "will not be considered as working time for any purpose."

I trust that this satisfactorily answers your inquiry. Should you have further questions please feel free to communicate with me.

Very truly yours,

/s/ Pat Meloan

Regional Director

Encl.

Administrative Ruling of Administrator, United States Department of Labor, Wage and Hour and Public Contracts Division

U. S. DEPARTMENT OF LABOR
WAGE AND HOUR AND PUBLIC CONTRACTS DIVISIONS
Washington 25, D. C.

Feb. 21, 1962

Mr. Owen D. Nee
Cleary, Gottlieb & Steen
Attorneys-at-Law
52 Wall Street
New York, New York

Dear Mr. Nee:

This is in further reference to the problem considered in our conference and in subsequent correspondence, concerning the application of the Fair Labor Standards Act and the Portal-to-Portal Act of 1947 to time spent by construction workers on a project in Chesapeake Bay, in traveling to and from the job site in boats furnished by the contractors.

It appears that the travel activity involved is preliminary and postliminary travel before and after the employees' workday at the job site, of the kind referred to in section 4 of the Portal Act. The travel varies with respect to the time required for the boat trips as among different employees and different work periods depending on weather conditions and the distance from shore that particular employees are working at the particular time. If the travel activity is compensable by an express provision of a collective bargaining agreement applicable to such employees or by a custom or practice which is not inconsistent with such agreement, section 4(d) of the Portal Act requires that the travel time be counted as hours worked under the Fair Labor Standards Act; otherwise it need not to be so counted.

As I understand the facts, the matter of boat travel to and from the job site was a part of the subject matter of the negotiations between the employers and unions representing the construction workers who are employed on the job, which culminated in collective bargaining agreements covering the wages, hours, and working conditions on the project. The provisions relating to boat travel contained in these agreements vary somewhat in their terms, but all of them provide for the payment to each worker of a stated sum for "each day that an employee rides on a boat getting to and from his place of employment." The agreements with the various unions specify such daily amounts in sums varying from $1.25 to $2.50, depending on the craft involved. A number of the agreements refer to the stated sum as a payment "in addition to the wages agreed upon in the existing local agreement" and provide that the stipulated amount will be accepted "as a payment for the inconvenience involved in getting to and from work." Indicative of the intent of the parties, although not controlling with respect to the statutory payment requiremens, is an additional provision in these documents in which the union "agrees that any time spent by such employees riding in boats to and from work will not be considered as working time for any purpose." The collective bargaining agreement with the remaining union, which was negotiated in settlement of a strike of its members, resolved an issue raised in the negotiations by the union's insistence that boat travel time be counted and paid for on an hourly basis and the employers' counter-proposal that a lump sum be paid in lieu of compensation for travel time. This agreement in terms states that the daily allowance agreed upon "shall fully compensate the employee for any time spent in riding to and from work. . . ." You have indicated that it was after negotiation of this agreement that the agreements with other crafts mentioned above were executed. A letter from the Assistant to the General President of the international union with whose local union this particular col-

lective bargaining agreement was negotiated states that he is familiar with the negotiations preceding its execution and that "the travel allowance mentioned in the agreement negotiated was to be the full sum to be received by employees because of time spent in travel by boat from their assembly point on shore and their work locations in the Bay and it was never contemplated or intended that such employees would receive for or because of such travel time any amounts other than the travel allowance set out in the agreement negotiated."

On the basis of the foregoing information and the additional information and reference which you furnished, concerning the negotiation of these agreements and the significance to be attributed to their terms in resolving the legal problems here, the matter has been the subject of careful study by this office and by the Office of the Solicitor, on whose advice this opinion is given. There is no doubt that in this case there are express provisions of written contract providing compensation because of the boat travel involved in getting to and from the job, and that there is no evidence of a custom or practice of the parties with respect to such compensation other than application of the contract provisions in accordance with their terms. There is, however, a question whether these express contract provisions make the *activity* of such travel "compensable" as required by the Portal Act in order to bring the travel time within the hours which must be counted as worktime for purposes of the Fair Labor Standards Act. We have concluded, on the basis of all the facts and circumstances bearing on the intent of these provisions, as we understand them to exist in this case, that their effect is to add an amount to the daily pay of the workers for the job *because of the travel factor* but not to provide compensation *for the activity of traveling* to and from the work site. Although concededly this is a borderline case in which a strong argument may be made that the language of the contract provisions

makes the travel activity itself compensable, we believe that the conclusion we have reached is more consistent with the meaning which the parties attribute to the contract language. Where provisions of a collective bargaining agreement have been mutually agreed upon, their interpretation is primarily a matter for the parties to the contract. From the materials presented to us we understand that the parties consider the contract provision to call for compensation in lieu of, rather than as, payment for the activity of traveling by boat.

Our conclusion leaves for consideration one other matter concerning compliance with the provisions of the Fair Labor Standards Act. Under section 7(d) of the Act, the daily amounts paid to workers who travel by boat are included in the regular rate of pay on which overtime compensation for work in excess of 40 hours in the workweek must be computed at time and one-half. Although the travel time need not be included in computing the hours worked for overtime pay purposes under the Act, the regular hourly rate on which the statutory overtime pay is computed must include the hourly equivalent in each workweek of the sums paid in that workweek by reason of boat travel by the worker. It is my understanding that the necessary action to ensure compliance retroactively and for the future with this requirement will be taken by the employers on the project.

Sincerely yours,

/s/ Clarence T. Lundquist
Administrator

ORAL OPINION OF THE UNITED STATES DISTRICT COURT

(tr. 544) * * *

THE COURT: Gentlemen, this presents a most difficult and interesting question concerning the application of the Portal-To-Portal Act.

Clearly the parties agreed that any time spent by the employees riding in boats to and from the work would not be considered as working time for any purpose. If we follow only the intent of the parties there is no question that the boat time should not be a factor in computing overtime. We know, however, that there are many cases generally construing other sections of the Fair Labor Standards Act that demonstrate that the language of the Act must control over the intent of the parties. For example, parties cannot contract for time and a quarter for overtime.

There is much to be said from a policy standpoint for each side of the argument. The position expressed by Judge Walsh in *Gramiak* v. *Pittston Stevedoring Corp.* 13 WH Cas 17, 30 CCH, paragraph 70,098 (D.C.S.N.Y., 1956) presents a very logically reasoned conclusion interpreting the Act with respect to the factual situation presented in that case. Of course, the facts in the case before us are far different.

The Act expresses a basic proposition and it appears to the Court that the language of the Act is very plain and should be applied literally. Congress has provided that employers do not have to pay for travel, but if employers (tr. 545) and employees do bargain for such pay, and the employers pay it, then the activity is compensable and overtime wages are computed with travel time included.

In this case the parties did bargain about the pay for travel in the boats. The distinction between paying for the travel factor as compared with paying for travel is too esoteric to be maintained. The policy reasons for this are very clear. Once parties to a labor contract make a bargain for the compensation of travel, they should know that it will be considered in computing wages. The Act clearly provides for this. If the Act is construed otherwise, the language of every contract would have to be scrutinized,

and labor agreements could provoke litigation. There are many statutes that are designed to put litigation at rest and this, it appears to the Court, is one of them.

In this case we also have as a significant factor that working time could, and sometimes did, start while the men were still in the boats.

The Court rules that the time spent in boats must be considered in computing overtime.

The Court overrules the motion to set aside the verdict.

Now, I hope that I have disposed of every problem (tr. 546) so that when you take this case on appeal you will have an opportunity to assign error and cross error.

Is there any ruling outstanding that counsel know of?

All right, the Clerk is directed to enter judgment in each of the cases for the defendants.

Gentlemen, I want to thank both of you for the assistance you have given me and to express to you the pleasure I found in having you appear in this case.

* * *

OPINION OF COURT OF APPEALS, FOURTH CIRCUIT

Before BOREMAN and BRYAN, Circuit Judges, and BARKSDALE, District Judge.

ALBERT V. BRYAN, Circuit Judge:

The Portal-to-Portal Act of 1947 [1] relieves an employer from liability to pay an employee, for certain activities, the minimum wages or overtime compensation prescribed by the Fair Labor Standards Act of 1938 [2], as

1 29 U.S.C. § 251 et seq.

2 29 U.S.C. §201 et seq.

amended. Certain employees — operating engineers and ironworkers — of the appellee corporations were denied overtime compensation in the District Court by reason of these relief provisions, and they appeal.[3] We affirm.

The appellees were the contractors for the construction of a bridge-tunnel for the Chesapeake Bay Bridge-Tunnel Commission, a body corporate and politic established by the Virginia legislature. The project consisted of vehicular bridges and tunnels, 17.9 miles in length, spanning Chesapeake Bay where it meets the Atlantic Ocean. The contract was let on July 21, 1960 and work began in September 1960.

The workers on this enterprise, of course, had to have transportation from the shore to their places of work in the Bay. The time required for this travel, at the beginning and end of the day, would vary from 15 minutes to an hour for each trip, depending upon the location of the employee's work point, weather conditions and other factors.

At the outset, the workers through their unions[4] desired to negotiate an agreement that all riding time, both to and from work, should be paid for at their regular wage rate, but this was unacceptable to the contractors. Also unacceptable was the workers' final offer on April 18, 1961, before going on strike the next morning, that they would

---

[3] Their claims were asserted in three independent actions. In two the plaintiffs were operating engineers, and in the other they were ironworkers. Three of the four defendant-employers (in cases #10,269 and #10,271 here)—Tidewater Construction Corporation, Raymond International, Inc. and Peter Kiewit Sons' Company—were doing business as joint venturers under the designation of TRK; the remaining defendant-employer (in #10,270) was Merritt-Chapman & Scott Corporation. The actions were tried together and the appeals consolidated for argument.

[4] The operating engineers were represented by the International Union of Operating Engineers, Local No. 147, the ironworkers by the Ironworkers Local Union No. 79.

ride to work on their own time but be paid for the return trip. After the inception of the strike, further negotiations culminated in an agreement between the operating engineers and the contractors, which provided a daily allowance of $2.50 "on each day that an employee rides on a boat getting to and from his place of employment." Subsequently, similar travel allowances were arranged with the other employees, including the ironworkers.

The present claims are solely for overtime compensation. Each worker spent at least 40 hours per week on the job, so that the riding time, if compensable in wages, would constitute overtime. Minimum wages are not involved. The issue here is made by the assertion of the workers, and the denial of the contractors, that in reckoning overtime, the travel period should be counted as hours worked.

The agreement between the operating engineers and the contractors, as relevant, provides:

> "It is hereby agreed between Tidewater-Merritt-Raymond-Kiewit (Tidewater Construction Corporation, Merritt-Chapman & Scott Corporation, Raymond International, Inc., and Peter Kiewit Sons' Company) and the International Union of Operating Engineers, Local Union No. 147, in regard to persons represented by the Union employed on the Chesapeake Bay Bridge-Tunnel Project that on each day that an employee rides on a boat getting to and from his place of employment, he shall receive a travel allowance of $2.50 per day.
>
> "*This allowance shall fully compensate the employee for any time spent in riding to and from work* and fully satisfies the provisions of Article VIII of the basic agreement between the Contractors in the area and the Union." (Accent added.)

The pertinent portion of the ironworkers' agreement reads:

> "5. Time spent by employees riding in boats to and from work *will not be considered working time for any purpose.* It being clearly understood that Ironworkers will be covered under the Workmen's Compensation Laws of the Commonwealth of Virginia, while traveling in boats to and from the working sites." (Accent added.)

The Portal Act in § 4(a), 29 U.S.C. § 254(a), excepts from the minimum wage and overtime compensation provisions of the FLSA the following activities:

> "(a) • • •
>
> "(1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, • • •
>
> • • • • •
>
> "which occur[s] either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities."

Following these clauses subsection (b) declares in pertinent part:

> "(b) Notwithstanding the provisions of subsection (a) [supra], • • • the employer shall not be so relieved if such activity *is compensable by* • • •
>
> "(1) an express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer;" (Accent added.)

Holding that a genuine issue of fact existed, the District Judge denied the contractors' motion for summary judgment based on their good faith reliance upon a written ruling of the Administrator of the Wage and Hour and Public Contracts Division, United States Department of Labor, which declared the travel time not to be compensable work time. Such reliance would constitute a complete defense, under § 10 of the Portal Act, 29 U.S.C. § 259(a), infra, to the employees' claims.

The contractors then moved for judgment on the pleadings, contending: (1) the riding time was not compensable under the FLSA, by virtue of § 4(a) of the Portal Act, 29 U.S.C. § 254(a); and (2) the riding time was not made "compensable" by the parties' contracts as permitted by § 4(b), 29 U.S.C. § 254(b). A ruling on this motion was deferred until after verdict by the jury empanelled on the plaintiffs' demand. The District Judge seemingly then held the view which he later expressed that the workers' travel time was, under § 4(a) of the Portal Act, a noncompensable activity. However, he believed that the agreements between the workers and contractors made the travel "compensable" as allowed by § 4(b). The relief of § 4(a), he thought, was thus withdrawn from the contractors unless they were exonerated by § 10 of the Portal Act, 29 U.S.C. § 259(a):

> " * * * no employer shall be subject to any liability * * * for or on account of the failure of the employer to pay minimum wages or overtime compensation under the * * * [FLSA and other Acts] if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation, of the agency of the United States specified in * * * this section [the Administrator of the Wage and Hour Division of the Department of Labor] * * *."

Therefore, the only issue submitted to the jury was the question whether the contractors had in good faith relied upon the ruling of the Administrator. The jury found for the contractors.

[1] The District Judge, we think, should have granted the contractors's motion for judgment on the pleadings or their motion on the same ground for a directed verdict. He rightly felt that the travel time was within § 4(a), and so charged the jury. Thereupon the *only* question remaining was whether this time had been removed from § 4(a) by the agreements. This required an interpretation by the court alone. Looking at the agreements the only reasonable construction was that the activity did not comprise compensable work hours. See Gramiak v. Pittston Stevedoring Corp., 13 WH Cas. 17, 30 CCH Par 70,098 (S.D. N.Y.1956). Hence the contractors were then entitled to judgment.

[2] The consideration of good faith reliance on the administrative ruling as allowed by § 10 was inappropriate here. Its relief is pertinent only on the issue of whether an employer is liable for minimum or overtime wages when, acting on an administrative ruling, he has treated certain activity as exempted by § 4(a), but subsequently such activity is authoritiatively declared not exempt. Section 10 has no relevancy if the court unequivocally finds the activity to be within § 4(a). Of course, the court may consider the ruling in reaching a conclusion on whether the activity is within § 4(a).

[3] The administrative advice had no bearing here upon the efficacy of the agreements. Once the activity was adjudged to be under § 4(a), whether the agreements removed it was not a question on which the administrative ruling had any weight. The contractors were bound by what the court should say was their intention. They could

not thereafter plead the defense of good faith reliance, under § 10, on the Administrators view that the agreements did not dissolve the immunity bestowed by § 4(a). Thus the agreements should not have been sent to the jury even for consideration in the light of § 10.

The District Judge was apprehensive lest the agreements attempted to exonerate the employers when the Portal Act did not permit it. But that concern was dispelled by the ruling of the Court — altogether correctly — that the activity was within § 4(a). That determination removed all ground for the apprehension. To repeat, the sole remaining question then was a proper reading of the agreements.

However, the care and precaution of the District Judge in sending the case to the jury were not harmful, and no error was committed in the conduct of the trial. For the reasons we have outlined the judgments of the District Court dismissing the actions of the workers are sustained.

Affirmed.

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IN THE

Supreme Court of the United States

October Term, 1966

No. 493

JOSEPH ROBERT RALPH, EUGENE C. LEWIS, AND M. RAY HURST, JR., ET AL.,
Petitioners,

v.

TIDEWATER CONSTRUCTION CORPORATION, A CORPORATION, RAYMOND INTERNATIONAL, INC., A CORPORATION, AND PETER KIEWIT SONS' CO., A CORPORATION, JOINT VENTURERS, TRADING AS TIDEWATER-RAYMOND-KIEWIT, AND MERRITT-CHAPMAN & SCOTT CORPORATION,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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September 22, 1966

TABLE OF CONTENTS

	Page
I. Opinions Below	1
II. Jurisdiction	2
III. Questions Presented	2
IV. Statutes Involved	2
V. Statement of the Case	3
VI. Argument	5
1. The Riding Time Was Made Non-Compensable By Section 4(a) of The Portal Act	5
2. The Collective Bargaining Agreements Did Not Convert The Riding Time to "Hours Worked"	5
3. Respondents Are Supported By Jury Verdicts That They Relied in Good Faith and In Conformity With A Ruling of The Wage and Hour Administrator	7
VII. Conclusion	7
Appendix A	9

TABLE OF CASES

Bowers v. Remington Rand, Inc., 159 F. 2d. 114 (7th Cir., 1946)	6
Campbell v. Horace F. Wood Auto Livery Co., Inc., 12 WH Cas 299 (D. C. S. Ind., 1954)	7
D A & S Oil Well Servicing, Inc. v. Mitchell, 262 F. 2d. 552 (10th Cir., 1958	5
General Electric Co. v. Porter, 208 F. 2d. 805 (9th Cir., 1953)	6

Page

Gramiak v. Pittston Stevedoring Corp., 13 WH Cas 17, 30 CCH ¶ 70,098 (D. C. S. N. Y., 1956) 7

Spring v. Washington Glass Co., 15 F. Supp. 312 (D. C. WPa., 1957) 7

Steiner v. Mitchell, 350 U.S. 247 5

U.S. v. Stocks Lincoln-Mercury, Inc., 307 F. 2d. 266 (10th Cir., 1962) 7

Wirtz v. Flint Rig Co., 222 F. Supp. 707 (D. C. Mont., 1963) .. 5

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I

OPINIONS BELOW

The administrative ruling of the Administrator of the Wage and Hour and Public Contracts Division, United States Department of Labor, is printed in Petitioners' Appendix B at p. 18.

The oral opinion of the District Court is unreported and is printed in Petitioners' Appendix B at p. 21.

The opinion of the Circuit Court is reported at 361 F. 2d. 806 and is printed in Petitioners' Appendix B at p. 23.

II

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

III

QUESTIONS PRESENTED

1. Was traveling time in boats between shore and work sites during construction of the Chesapeake Bay Bridge Tunnel compensable under the Fair Labor Standards Act in spite of Section 4(a) of the Portal-to-Portal Act?

2. Was such time made "hours worked" by reason of Section 4(b) of the Portal Act?

3. If the answer to either of the first two questions is yes, was Respondents' reliance upon and conformance, in good faith, with a written interpretation of the Wage and Hour Administrator, as found by the jury, a complete defense to this action by reason of Section 10 of the Portal Act?

IV

STATUTES INVOLVED

The relevant provisions of the Fair Labor Standards Act, 29 U.S.C. Section 201, *et seq.* and the Portal Act, 29 U.S.C. Section 251, *et seq.*, are set forth in Petitioners' Appendix A, pp. 11-13. The relevant section of the Portal Act dealing with reliance on administrative rulings, 29 U.S.C. Section 259, is printed as Appendix A hereto, *infra*, p. 8.

V

STATEMENT OF THE CASE

After the Chesapeake Bay Bridge Tunnel was completed, the Petitioners, 69 of the approximately 3000 employees who worked on the project, sued their employers, Respondents, for overtime payment for the time they spent riding in boats between shore and their respective working places before and after working hours. No work was performed in the boats, the employees being free to sleep, read or merely enjoy the ride (pp. 88-91 of Respondents' Appendix to the Circuit Court, hereinafter cited "TRK-MER."). Utilization of this form of transportation was not required by Respondents and as the project progressed some employees drove their private automobiles across and through the completed portion of the bridge-tunnel complex rather than ride in Respondents' personnel boats. (TRK-MER. 95).

At the outset of the project this precise riding time had been the subject of negotiations between Respondents and the Unions which represented Petitioners and the other employees on the project. It was agreed between the parties to these negotiations that in the light of the economic realities of the project, the employees would accept a daily lump-sum payment in lieu of pay for travel time.

Shortly after construction began the Wage and Hour Division conducted an investigation of the pay practices on the project. The Regional Director took the position that although the travel time was not "hours worked" by reason of Section 4(a) of the Portal Act, Respondents had inadvertently made it technically "compensable" by reason of the peculiar language of the collective bargaining agreements providing for daily lump sums. Since the Regional Director's view represented an interpretation of the Portal Act at complete variance with that rendered by Respondents'

Counsel before the negotiations commenced and compliance with it would have resulted in enormous unexpected costs, Respondents asked the Administrator himself, the only official empowered under the Act to issue binding rulings, to rule on the matter. It was made perfectly plain that Respondents would necessarily be governed by the views of the Administrator.

The Administrator agreed with the Regional Director that the travel time was not "hours worked" by reason of Section 4(a) of the Portal Act. But the Administrator did not agree that the contracts had made the travel time "compensable" and he therefore ruled that the Respondents were not in violation of the law. Respondents relied upon the Administrator's ruling.

Three years later at the trial, the District Judge also agreed that the travel time was not "hours worked" by reason of Section 4(a), but thought that the contracts had made the time "compensable" and, therefore, submitted to a jury the question whether the Respondents had in good faith relied upon the Administrator's ruling, admitted by Counsel for Petitioners during the trial in the District Court to be a complete defense to the claim by reason of Section 10 of the Portal Act. The jury promptly found for the Respondents.

On Petitioners' appeal, the Court of Appeals also agreed that the travel time was not "hours worked" by reason of Section 4(a) and in addition agreed with the Administrator that the contracts had not made the time compensable and held the submission of the good faith defense to the jury was harmless error. The judgment for the Respondents was therefore affirmed.

VI.

ARGUMENT

1. The Riding Time Was Made Non-Compensable By Section 4(a) of The Portal Act.

The question of riding time having been so clearly disposed of by the Congress in its choice of language used in and the legislative history of Section 4(a), there is little judicial authority subsequent to the enactment of the Portal Act. But what there is clearly supports the findings of the Courts below that the time spent riding in boats to and from the work sites on the project is not compensable. See *Wirtz* v. *Flint Rig Co.,* 222 F. Supp. 707 (D.C. Mont., 1963) and *D A & S Oil Well Servicing, Inc.* v. *Mitchell,* 262 F. 2d. 552 (10th Cir., 1958). Furthermore, *Steiner* v. *Mitchell,* 350 U.S. 247, cited by Petitioners, actually supports Respondents' contentions, at page 256:

> "We, therefore, conclude that activities performed either before or after the regular work shift, on or off the production line, are compensable under the portal-to-portal provisions of the Fair Labor Standards Act *if* those activities are an integral and indispensable part of the principal activities for which covered workmen are employed *and* are *not* specifically excluded by Section 4(a)(1)." (Emphasis supplied).

Thus, the Regional Director, the Administrator and both Courts below were clearly correct in ruling that the travel to and from the work sites on the bridge-tunnel project was precisely the type of "riding" *expressly made non-compensable* by Section 4(a)(1) of the Portal Act.

2. The Collective Bargaining Agreements Did Not Convert The Riding Time to "Hours Worked."

This question is not, as contended by Counsel for Petitioners, whether the collective bargaining agreements re-

moved the activity from coverage, but whether these agreements, by virtue of Section 4(b)(1) put the riding time back under the Act's provisions.

The parties to the union agreements involved in this litigation understood and agreed that travel time would not be treated as "hours worked" for purposes of the Act. It is clear that they did not intend to make travel time "compensable." Representatives of both the Contractors and the unions so testified. (TRK-MER. 32-33, 61, 102, 112). It is equally clear that such agreements are envisioned by Section 4(b)(1) and (c) of the Portal Act.

Agreements which violate the provisions or purposes of the Act should not be given effect. However, this rule does not apply to agreements to settle the question whether certain activity or non-activity constitutes work or employment where it is not such by statute. *Bowers* v. *Remington Rand, Inc.,* 159 F. 2d. 114 (7th Cir., 1946), *cert. den.* 330 U.S. 843 (1947); *General Electric Co.* v. *Porter,* 208 F. 2d. 805 (9th Cir., 1953) *cert. den.* 347 U.S. 951 (1954). In instant case the question was not whether the Respondents by contract had sought to evade the Act, but whether inadvertently they had by contract made the riding time compensable.

Since the bridge-tunnel project itself was unique and the contract provisions were tailor-made to fit the peculiar conditions prevailing, it is obvious that a Supreme Court construction of these particular contracts would be of interest only to the litigants in this case and would make no significant contribution to the law generally. As a matter of fact, in the 19 years since the Portal Act, only one case can be found, that unreported officially, construing the effect of contract provisions dealing with compensation for time which is not "hours worked" under the statute.

That case, *Gramiak* v. *Pittston Stevedoring Corp.*, 13 WH Cas 17, 30 CCH ¶70,098 (D.C.S.N.Y., 1956), completely accords with the decision of the Administrator and the Circuit Court in this case.

3. Respondents Are Supported by Jury Verdicts That They Relied In Good Faith And In Conformity With A Ruling of The Wage And Hour Administrator.

Counsel for Petitioners conceded in the District Court that reliance in good faith upon and in conformance with a ruling of the Wage and Hour Administrator was a complete defense to the Petitioners' claims by reason of Section 10 of the Portal Act. Nowhere in their Petition for a Writ of Certiorari do Petitioners challenge the verdict of the jury which found for Respondents on this issue. The validity of the defense of Section 10 of the Portal Act has never been questioned by the Courts. See *U. S.* v. *Stocks Lincoln-Mercury, Inc.*, 307 F. 2d. 266 (10th Cir., 1962); *Spring* v. *Washington Glass Co.*, 15 F. Supp. 312 (D.C. WPa., 1957); and *Campbell* v. *Horace F. Wood Auto Livery Co., Inc.*, 12 WH Cas 299, (D.C.S. Ind., 1954).

While the Circuit Court held that Section 10 was inappropriate in this case, the Court concluded that the care and precaution taken by the District Judge in sending the case to the jury was not harmful.

VII

CONCLUSION

This petition involves no important question of federal law as indicated by the dearth of litigation on the points raised. It involves no more than remote issues derived from a peculiar set of facts concerning a unique project, which issues have been correctly determined by the Administrative agency charged by Congress with the duty of enforcing the

Act and the two Courts below. Any further consideration of the abstruse issues raised in this case would not contribute to the extant body of the law. In view of the obvious lack of any general interest in the issues presented in this case, it is respectfully requested that the Respondents be spared further litigation. For these reasons, the writ of certiorari should be denied.

Respectfully submitted,

TIDEWATER CONSTRUCTION CORPORATION, RAYMOND INTERNATIONAL, INC., PETER KIEWIT SONS' COMPANY AND MERRITT-CHAPMAN & SCOTT CORPORATION

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APPENDIX A

Portal-to-Portal Act, Section 10, 29 U.S.C. Section 259:

§ 259. Reliance in future on administrative rulings, etc.

"(a) In any action or proceeding based on any act or omission on or after May 14, 1947, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation, of the agency of the United States specified in subsection (b) of this section, or any administrative practice or enforcement policy of such agency with respect to the class of employers to which he belonged. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.

"(b) The agency referred to in subsection (a) of this section shall be—

"(1) In the case of the Fair Labor Standards Act of 1938, as amended—the Administrator of the Wage and Hour Division of the Department of Labor;"